Supreme Court, U. S.
FILED
APR 18 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1448

ALLIED MEAT COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the
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October Term, 1976

No. _____

ALLIED MEAT COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Allied Meat Company, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit enforcing an Order issued by the National Labor Relations Board against Petitioner, Allied Meat Company.

OPINIONS BELOW

The Opinion of the Court of Appeals which appears at Appendix F hereto will not be officially reported as it was classified "Not for Routine Publication" by the Court of

Appeals. The Decision and Order and Decision upon Reconsideration by the National Labor Relations Board are contained at Appendix D and E, respectively hereto and are reported at 220 NLRB No. 12 and 221 NLRB No. 60. The unreported administrative Opinions in the underlying representation Case No. 27-RC-4663 before the National Labor Relations Board are: Decision, Order and Direction of Second Election contained in Appendix A hereto; Acting Regional Director's Report on Objections to Second Election with Recommendations to the Board, contained in Appendix B hereto; and Supplemental Decision and Certification of Representative, contained in Appendix C hereto.

JURISDICTION

The Judgment of the Court of Appeals was dated January 18, 1977 and entered on January 24, 1977. The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding as a matter of law that employer objections to an election, based in part on union conduct, could not be a basis for setting aside the election where prior to the election the union guaranteed employees a forty hour workweek if the union won the election, and the employer had no knowledge of the guarantee until after the election?

2. Where the National Labor Relations Board acts in contravention of its own rules, regulations and guidelines, should its bargaining order issued against an employer be denied enforcement?

STATUTES AND REGULATIONS INVOLVED

Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*

Sections 11424.4 and 11428.4 of the National Labor Relations Board Field Manual (G.P.O. 1971). (App. G).

Section 104.24 of the National Labor Relations Board Rules and Regulations, Series 8, as amended (29 C.F.R.). (App. H).

STATEMENT OF THE CASE

On November 30, 1973 the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 641 (hereinafter referred to as the Union) lost an election conducted by the National Labor Relations Board (hereafter referred to as the Board) to determine whether Allied Meat employees wanted the Union as their collective bargaining representative. (R. 514).[1] The results of the election were 13 votes in favor of the Union and 13 votes against the Union. The Union filed six objections to the conduct of the election. (R. 516). After administrative investigation, the Regional Office of the Board determined that a hearing should be held relative to objections 2 and 3, alleged cursing and intimidation of unit employees and employer granting of wage increases to seven employees prior to the election.

Section 11424.4 of the National Labor Relations Board Field Manual (G.P.O. 1971) provides that at the hearing on objections the Regional Office's attorney, "must exercise self-restraint. He must be impartial, and he must display the appearance of impartiality." (App. G). Section 11428.4 additionally provides that the Regional Office's representative is to refrain from introducing any evidence until the other parties have completed their cases. (App. G).

To the contrary, the Regional Office's representative showed a complete lack of impartiality and, rather than the hearing being conducted as a non-adversary proceeding, the Regional Director's representative was allowed to embark upon a course which was designed to establish a violation of the law by the employer, rather than as the Field Manual directs, merely attempt to get all of the facts into the record in order to make a complete record.

The Regional Director's representative failed to exercise self-restraint, he clearly and blatantly took on the role of an advocate. This included accusing Allied's former counsel of

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[1] References to the certified record before the Court of Appeals shall be designated "R." with the page designation immediately following.

being "irresponsibly unethical;" introducing exhibits and new evidence prior to cross-examination of a witness by Allied's former counsel and prior to the union's resting of its case. (R. 541 B - 541 F). The Hearing Officer, a co-worker of the Regional Office's representative at the hearing, allowed this conduct to continue unrestrained.

The Hearing Officer found objection number two to be without merit. As to objection number three, the Hearing Officer's report recommended that the first election be set aside. He found that wage increases to five of seven unit employees were granted for purposes intended to influence the outcome of the first election. (R. 536). This recommendation was affirmed by the Board with Chairman Miller dissenting as to two of the wage increases. (App. A). A second election was directed. (R. 558-561). The Hearing Officer and the Board held that the evidence, based primarily on credibility resolutions, was insufficient to show that the wage increases were given for reasons other than the pending election.

The second election directed by the Board was conducted on October 18, 1974 and resulted in 19 votes in favor of the Union and 4 votes against the Union. (R. 579, 568). However, in the weeks immediately preceding the second election, the employer's business was caught in an economic downturn and the employees were no longer working a full 40 hour workweek. Unbeknownst to the employer until the second election was concluded, the Union had "guaranteed" the employees a 40 hour workweek if they voted the union in. The employer had no opportunity to respond to the guarantee made by the Union and when it learned of the guarantee, Allied filed objections to the conduct of the second election. The Acting Regional Director for Region Twenty-Seven overruled the objections and with reference to the guarantee made by the Union to unit employees held that the guarantee was one which the union was in no position to fulfill. (App. B).

The certification of the results of the election subsequently issued and, thereafter, the employer refused to bargain with the Union in order to test the validity of the certification.

The Union filed unfair labor practice charges against Allied alleging a violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and subsequently, on April 30, 1975, a Complaint and Notice of Hearing issued setting June 24, 1975 as the hearing date. (R. 583-587). It was not until June 12, 1975 that counsel for the General Counsel filed a Motion for Summary Judgment with the Board, a copy of which was received by Allied's counsel ten days prior to the scheduled hearing date. It was not until June 17, 1975 that Allied's counsel was notified that the unfair labor practice hearing was postponed indefinitely pending the Board's consideration of the Motion for Summary Judgment.

This alone resulted in substantial prejudice to Allied. The unnecessary delay in the filing of the Motion for Summary Judgment necessitated Allied's continued pre-trial preparation and the incurring of unnecessary attorney's fees, costs and expenses.

On June 19, 1975 the Board issued a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted and directed that Allied file a Response on or before July 3, 1975 with the Board in Washington, D. C. (R. 594). Allied, in a timely manner, mailed the original and requisite number of copies of its Response to the Board in Washington, D.C. and served a copy of its Response on the remaining parties to the proceeding with "Affidavit of Service on the Parties to this Proceeding." (R. 594).

The Board issued its Decision on August 28, 1975 and therein stated that the employer had failed to file a Response to the Notice to Show Cause. (R. 602). The Board granted the Motion for Summary Judgment. Allied's counsel, upon receipt of said Decision, immediately filed a Motion for Reconsideration taking strenuous exception to the Board's allegation that it failed to file a Response to the Notice to Show Cause. Thereafter, the Board on November 3, 1975 issued its Decision upon Reconsideration and reaffirmed the August 28, 1975 Decision. (App. E). The Board therein again

asserted that the employer had improperly filed its Response to the Notice to Show Cause. (R. 615). The Board's application for enforcement with the Court of Appeals continued to assert that Allied had misfiled its Response with the Regional Office rather than with the Board in Washington, D. C.

Counsel for Allied obtained the original record from the Clerk of the Tenth Circuit Court of Appeals which was prepared by the Board and sent to the Court. Page 595 of the original record shows that in fact the Board in Washington, D.C. did receive the employer's Response on July 3, 1975, as was directed in the Board's June 19, 1975 Notice to Show Cause. (R. 595). The Board to this date still has not explained why it failed and refused to consider the employer's Response and has not admitted that it did in fact receive Allied's Response.

The Court of Appeals issued its Decision on January 3, 1977 upholding the Board's setting aside of the first election, found that in fact Allied's Response to the Notice to Show Cause was received by the Board as required, but held that Allied was not thereby prejudiced. Additionally, the Court refused to disturb the credibility resolutions made by the Hearing Officer, and concluded that as a matter of law Allied's objections to the conduct of the second election could not serve as a basis to set aside that election. Enforcement of the Board's Order was granted.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS' DECISION THAT AS A MATTER OF LAW ALLIED'S OBJECTIONS COULD NOT SERVE AS A BASIS FOR SETTING ASIDE AN ELECTION CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS

This case is a classic example wherein the Board has applied a double standard. One set of standards was applied to Allied which resulted in a voiding of the first election for alleged pre-election employer misconduct. With regard to the second election, a separate set of standards was applied by the

Board to term the Union's pre-election conduct as mere puffing since the Union was in no position to fulfill the guarantee it made to unit employees. The employer, Allied, was not even afforded the opportunity of a hearing on its objections.

Allied submits that the Court of Appeals' affirmance of the Board's Decision denying a hearing on objections and upholding the Board's overruling of the objections was erroneous. The second election occurred in the context of an employer who was faced with a poor economic situation; employees who were working less than 40 hours a week; employees who worked less than a full workday even on the day of election; and a union who guaranteed employees a 40 hour workweek if the election was won.

In *Cross Baking Company v. NLRB*, 453 F.2d 1346 (C.A. 1, 1971), the Court of Appeals refused to enforce the Board's order against the employer where two days prior to the election the union had told the voters that it received a 75 cent increase in wages and benefits in its first contract with a nearby employer. The union thereby created a false impression that it had gotten a 75 cent immediate increase for the employees at the nearby plant when, in fact, the union had only gotten a 60 cent increase spread out over a three-year period which, in reality, was only an increase of 20 cents a year. Similarly, in *Walled Lake Door Company v. NLRB*, 472 F.2d 1010 (C.A. 5, 1972), the Fifth Circuit Court of Appeals overturned the Board's order which had refused to set aside an election. In that case the union had told the employees that all of the employer's four other plants were unionized when in fact only two of the employer's five plants were unionized.

The fact that the union in this case may not have been in a position to fulfill its guarantee is irrelevant. The critical factor is that the guarantee was made, the employer did not learn of it until after the election was concluded and the employer had no chance to respond to the misrepresentation made to the employees. Guarantees such as these are more than mere puffing. *NLRB v. Lord Baltimore Press, Inc.*, 370

F.2d 397 (C.A. 8, 1966). Prior to voting the employees had a right to know that the mere fact that a union wins an election does not, *ipso facto*, result in a guaranteed 40 hour workweek. *Excelsior Laundry v. NLRB*, 409 F.2d 70 (C.A. 10, 1970). The mere fact that the Union denied making any such guarantee in and of itself creates a credibility resolution which could only be resolved through a hearing where testimony is given under oath. *Howell Refining Co. v. NLRB*, 400 F.2d 213 (C.A. 5, 1968). It is also evident that the employees in this case were not in a position to effectively evaluate propaganda, especially in light of the fact that a good number of the employees had been drinking immediately prior to the election. Under these circumstances, the employer had a right to reply to the Union's guarantee and present its position to the employees and correct a material misrepresentation. *Gulton Industries, Inc. v. NLRB*, 469 F.2d 1371 (C.A. 5, 1972).

II. THE COURT OF APPEALS' DECISION ENCOURAGES THE BOARD TO ACT IN DISREGARD OF ITS OWN RULES, REGULATIONS AND GUIDELINES

The Court of Appeals' Decision allows the Board to act with impunity. Although the hearing on objections to the first election should have been conducted as a non-adversary proceeding, the Regional Office's representative took on the role of an advocate and was allowed to do so by the Hearing Officer. The conclusion reached by the Board and affirmed by the Court of Appeals was no prejudice to the employer, Allied. Similarly, although the Board's Rules and Regulations provide that Motions for Summary Judgment are to be filed in a timely manner, such was not done in this case and the delay cost the employer unnecessary pre-trial preparation, attorney's fees, etc. Once again, the ruling of the Board as affirmed by the Court of Appeals, no prejudice to the employer.

Again, the Board issued a Notice to Show Cause specifying that Allied was to file a Response with the Board on or before July 3, 1975. Allied filed its Response in a timely

manner as directed. The Board chose to ignore the Response, issued its Decision and up through oral argument before the Court of Appeals denied that it had received Allied's Response. Allied requested reconsideration by a full panel of the Board in light of these features, however, the Board denied the Request for Reconsideration by the full panel, and the same panel reconsidered and reaffirmed its prior position. Once again, the Board Decision and the Decision of the Court of Appeals held that no prejudice was done to Allied.

It is plain that the Board was not willing to listen to Allied's position throughout these proceedings and, as affirmed by the Court of Appeals, the Board is allowed to act as it chooses without regard to published rules, regulations, and guidelines.

CONCLUSION

The Petitioner, Allied Meat Company, respectfully requests the Court to issue a Writ of Certiorari to the Tenth Circuit Court of Appeals to review its Decision in this matter.

Respectfully submitted,

GOOD AND STETTNER, P.C.

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Attorneys for Petitioner, Allied
Meat Company

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of April, 1977, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to Richard B. Bater, Esq., John H. Ferguson, Esq., and Elliott Moore, Deputy Associate General Counsel, attorneys for National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. I further certify that all parties required to be served have been served.

APPENDIX A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALLIED MEAT COMPANY

Employer

and Case 27-RC-4663

AMALGAMATED BUTCHER WORKMEN LOCAL 641

Petitioner

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 27 on November 19, 1973, an election by secret ballot was conducted on November 30, 1973, under the Regional Director's direction and supervision, among the employees of the stipulated appropriate unit. Upon conclusion of the election, the parties were furnished with a tally of ballots which showed that, of approximately 26 eligible voters, 26 cast valid ballots, of which 13 were for, and 13 against the Petitioner. There was one challenged ballot. Thereafter, the Petitioner filed timely objections to conduct affecting the results of the election, but then withdrew objections 1, 4, 5, and 6.

The Regional Director conducted an investigation of objections 2 and 3 and subsequently issued and served on the parties his Report on Challenges and Objections in which he recommended that the challenge be sustained and that Peti-

tioner's Objections 2 and 3 be determined by hearing.[1] Following a hearing before Hearing Officer Thomas M. Patton, he issued and served upon the parties his Report on Objections in which he recommended that Objection 2 be overruled and Objection 3 be sustained in part, and the election be set aside. Thereafter, the Employer filed exceptions to the Hearing Officer's rulings made at the hearing and his finding of merit in Objection 3, accompanied by a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees constitute a unit appropriate for collective bargaining within the meaning of the Act.

> All full-time and regular part-time production and maintenance employees, including sanitation and clean-up employees and delivery drivers employed by the Employer at 5900 Clarkson Street, and 709 West 8th Avenue,

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[1] In the absence of exceptions, the Board, by Order of its Executive Secretary dated February 20, 1974, adopted the Report of the Regional Director.

> Denver, Colorado; excluding office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

5. The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that no prejudicial error was committed.[2] The Board has considered the Objections, the Hearing Officer's Report, the Employer's exceptions and brief, and the entire record in this case, and hereby adopts the

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[2] The Employer excepted to the refusal of the Hearing Officer and Regional Director to grant its motion that the hearing be discontinued, that the Hearing Officer disqualify himself, and that the Board appoint a hearing officer from outside the 27th Regional Office as a result of alleged lack of impartiality of the Regional Office's representative at the hearing. Upon careful review of the record, we are not persuaded that the conduct of the Regional Director's representative exhibited lack of impartiality in violation of the Agency's Field Manual or otherwise, nor are we persuaded that the conduct complained of was in fact prejudicial to the Employer. We note that the record shows that the Hearing Officer, upon observing that counsel for the Employer and the Regional Office during a break in the hearing were engaged in a "heated discussion," walked away without hearing the alleged prejudicial remarks attributed by the former to the latter person. In such circumstances, we find that the Hearing Officer could not have been influenced by the incident in making his rulings and recommendations herein. As for the participation of the Regional representative in examining witnesses and introducing evidence, our review of the record does not disclose that he went beyond the permissible bounds of his function, which was to make certain that a complete record was made upon with the Hearing Officer, and eventually the Board, would be able to render their considered opinions. Rather we find that this representative interrogated witnesses and presented documentary evidence to bring out information to which he alone had access because of his knowledge of the contents of the Region's investigative file.

findings,[3] and conclusions,[4] and recommendations of the Hearing Officer.

Accordingly, we shall set the election aside.

ORDER

IT IS HEREBY ORDERED that the election conducted on November 30, 1973, be and it hereby is, set aside.

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[3] In the absence of exceptions, we adopt, pro forma, the finding of the Hearing Officer that Objection 2 lacked merit and that Objection 3 was not supported as to employees Lopez and Gamble.

[4] Chairman Miller would not find that the Ponzio and Mollendor wage increases constituted objectionable conduct in view of Wagner's testimony, corroborated by Ponzio, that such increases were given in response to threats by these two employees to quit if they did not get raises. This evidence, in the Chairman's view, required a finding that the increases were economically motivated and not calculated to interfere with the conduct of the election. The Hearing Officer, however, discredited Wagner's "threat to quit" testimony on grounds that it came forth, not when he was called by the Union as an adverse witness, but subsequently on direct examination as a witness for the Employer. Ponzio's corrobating testimony also was discredited because, according to the Hearing Officer, it was elicited in response to a leading question. In the Chairman's view, the reasons given for discrediting this testimony are without foundation. Wagner's "threat to quit" testimony as an Employer's witness was in amplification of his earlier testimony that the employees had pressured him for a raise. Ponzio's pertinent testimony followed a proper question, rephrased as the result of an earlier objection. Furthermore, Ponzio's testimony tended to be against his interest as a union organizer presumably hopeful of upsetting the election which the Union had lost; consequently, such testimony, in corroboration of Wagner, is entitled to considerable weight.

In all other respects, the Chairman agrees with the majority in setting aside the election based on the wage increases granted to Vialpando, Morrow, and Winans.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the stipulated unit at such time as the Regional Director for Region 27 deems appropriate. The Regional Director for Region 27 shall direct and supervise the election, subject to the National Labor Relations Rules and Regulations, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are employees engaged in an economic strike which commenced less than 17 months before the election date and who retained their status as such during the eligibility period and their replacement.

Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike or who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[5] Those eligible shall vote whether or not they desire

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[5] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236, *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director for Region 27 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this

to be represented for collective bargaining purposes by Amalgamated Butcher Workmen Local 641.

Dated Washington, D.C., August 28, 1974.

Edward B. Miller Chairman

John H. Fanning, Member

John A. Penello. Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5]Cont'd.
list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

ALLIED MEAT COMPANY

Employer

and Case No. 27-RC-4663

AMALGAMATED BUTCHER WORKMEN, LOCAL 641

Petitioner

ACTING REGIONAL DIRECTOR'S REPORT ON OBJECTIONS TO SECOND ELECTION WITH RECOMMENDATIONS TO THE BOARD

Pursuant to a Decision, Order, and Direction of Second Election issued by the Board on August 28, 1974, an election by secret ballot was conducted on October 18, 1974, under the direction and supervision of the Regional Director of the 27th Region, Upon conclusion of the election, the parties were served with a Tally of Ballots which showed that of approximately twenty-five eligible voters, nineteen cast ballots for the Petitioner, four voted against the Petitioner, and one ballot was challenged. Thereafter, the Employer filed timely objections to conduct affecting the results of the election, a copy of which was served on the Petitioner.

In accordance with Section 102.69(c) of the Board's Rules and Regulations, Series 8, as amended, the undersigned has investigated the objections and hereby reports as follows:

The Objections

The employer's objections are as follows:

"1. That the results of the November 30, 1973 election were valid and should have been certified by the Regional

Director for the Twenty-Seventh Region. Insufficient evidence supported the Board's August 28, 1974, decision, Order and Direction of Second Election.

2. That prior to and during the election held at the Employer's premises on October 18, 1974, officers, agents, representatives and stranger (non-employees of Allied) members of Petitioner, massed at the entrance to the Employer's premises and interfered with the ingress to and egress from the Employer's premises.

3. That prior to and during the election held at the Employer's premises on October 18, 1974, Petitioner furnished or caused to be furnished intoxicating beverages to the employees involved in said election.

4. That Petitioner made material misrepresentations of important facts to the employees involved in said election. Said misrepresentations were made in such a manner as to negate any opportunity for Employer to rebutt said misrepresentations.

5. That by the foregoing and by other acts and conduct the employees involved in said election in the voting unit were threatened, misled, and confused resulting in the election proceedings being prejudiced, free choice was impossible and the conditions for a free and fair election were absent. As a result, the employees in said voting unit were denied the rights guaranteed them by Section 7 and other Sections of the National Labor Relations Act, as amended."

In Objection No. 1, the Employer seeks to have the undersigned overturn the decision of the Board directing a second election. I have no authority to do so and I shall recommend that Objection No. 1 be overruled.

No evidence was adduced or proffered in support of Objections Nos. 3 and 5, and I shall, therefore, recommend that these objections be overruled.

With regard to Objection No. 2, the investigation disclosed that approximately thirty minutes prior to the start of the

election, four officials of the Union arrived at the Employer's premises for the scheduled pre-election conference. As the Board agent and the Employer's attorney had not yet arrived, the Union representatives engaged in conversations with several employees of Averch Packing Co., who were standing outside the building on coffee break. Averch Packing Co. and the Employer occupy different floors of the same building, but use the same entrance. After the Board agent and the Employer's attorney arrived, the Union representatives went inside the building for the pre-election conference and the Averch Packing Co. employees returned to work. There is no evidence that this group later reassembled or that there was any massed group of individuals outside the Employer's entrance during the election, nor is there any evidence that any of the individuals involved engaged in any conduct which could be the basis for setting aside the election. I shall, therefore, recommend that Objection No. 2 be overrruled.

As to Objection No. 4, the Employer has alleged that the Petitioner guaranteed the employees a forty hour work week should the Petitioner win the election. This allegation is unsupported by employee witnesses, the Union has categorically denied the allegation and, furthermore, the "guarantee" was one which the Petitioner was in no position to fulfill. Accordingly, I shall recommend that Employer's Objection No. 4 be overruled.

Recommendation

In accordance with the foregoing, it is hereby recommended that Employer's Objections numbered 1 through 5 be overruled and that the Board certify that a majority of valid votes has been cast for the Petitioner and that said organization is the exclusive bargaining representative of the employees in the unit found appropriate.

Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to the Report may be filed and if they are filed, must be received by the Board in Washington by December 19, 1974.

Signed and dated at Denver, Colorado, this 6th day of December, 1974.

(S E A L)

/s/ W. Bruce Gillis, Jr.

W. Bruce Gillis, Jr., Acting Regional Director
Region 27, National Labor Relations Board
260 New Custom House – 721 - 19th Street
Denver, Colorado 80202

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALLIED MEAT COMPANY

Employer

and

Case 27-RC-4663

AMALGAMATED BUTCHER WORKMEN
LOCAL 641, AFL-CIO

Petitioner

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to a second election held October 18, 1974[1] and the Acting Regional Director's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Acting Regional Director's findings and recommendations.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Amalgamated Butcher Workmen Local 641,

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[1] The election was conducted pursuant to the Board's direction of a second election on August 28, 1974 in a decision which is not contained in bound volumes of the Board's decisions. The tally was: 19 for and 4 against the Petitioner; there was 1 challenged ballot, an insufficient number to affect the results.

AFL-CIO, and that, pursuant to Section 9(a) of the Act the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All full-time and regular part-time production and maintenance employees, including sanitation and clean-up employees and delivery drivers employed by the Employer at 4900 Clarkson Street, and 709 West 8th Avenue, Denver, Colorado, excluding office clerical employees, professional employees, salesmen, guards and supervisors as defined in the Act.

Dated, Washington, D.C., February 27, 1975

John H. Fanning, Member

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX D

220 NLRB No. 12

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALLIED MEAT COMPANY

and Case 27–CA–4464

AMALGAMATED MEAT CUTTERS
AND BUTCHER WORKMEN OF
NORTH AMERICA, AFL-CIO

DECISION AND ORDER

Upon a charge filed on March 26, 1975, by Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, herein called the Union, and duly served on Allied Meat Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 27, issued a complaint on April 30, 1975 alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(1)(5) and (4) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on February 27, 1975, following a Board election in Case 27–RC–4663, the Union was duly certified as the exclusive collective-bargaining representative of

Respondent's employees in the unit found appropriate;[1] and that, commencing on or about March 21, 1975, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On May 12, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Respondent admits all the factual allegations of the complaint, including, *inter alia*, the appropriateness of the unit, the certification of the Union, and the Union's request and its refusal to bargain. In addition, Respondent submits affirmative defenses, to wit: that the Board erred in not certifying the results of an election conducted November 30, 1973;[2] a hearing should have been conducted on its objections to the second election conducted October 18, 1974; and the employees were denied rights guaranteed them by Section 7 and other provisions of the Act by the conduct alleged in its objections to the election.

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[1] Official notice is taken of the record in the representation proceeding, Case 27–RC–4663, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va., 1957); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

[2] An election was conducted in Case 27–RC–4663 on November 30, 1973. Upon objections thereto by the Union, a hearing was held which resulted in the Hearing Officer recommending that the election be set aside and another conducted because prejudicial misconduct by the Respondent had affected the results thereof. On August 28, 1974, the Board adopted the Hearing Officer's recommendation and directed a second election. The second election was conducted October 18, 1974, and resulted in a 19-to-4 vote in favor of the Union.

On June 16, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. She submits, in effect, that Respondent by its answer is attempting to relitigate issues which were raised and litigated in the underlying representation proceeding. Under well-settled rules precluding relitigation in an unfair labor practice proceeding of issues which were previously litigated in a representation proceeding, she moves for judgment and the entry of an appropriate order. Subsequently, on June 19, 1975, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent has not filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

As noted above, Respondent admits all the factual allegations of the complaint, including its refusal to bargain with the certified Union, and basically attacks the Board's direction of a second election in the representation proceeding and reasserts its objections to the second election and argues that a hearing is required on its affirmative defenses. By these assertions, Respondent is attempting to relitigate issues which were raised and litigated in the underlying representation case, as its objections to the second election included these issues, and were before the Board along with its argument that a hearing was required on its objections, which were a part of Respondent's exceptions to the Acting Regional Director's Report on Objections to the second election. On that occasion, the Board adopted the Acting Regional Director's findings and recommendation that the objections be overruled and certified the Union. Moreover, with regard to the necessity of a hearing, it is well settled that the parties do not

have an absolute right to a hearing. It is only when the moving party presents a *prima facie* showing of "substantial and material" issues which would warrant setting aside the election is he entitled to an evidentiary hearing.[3] It is clear that, absent arbitrary action, this qualified right to a hearing satisfies all statutory and constitutional requirements.[4] In the instant case, the Board fully considered Respondent's objections and exceptions and did not order a hearing, but rather adopted the Acting Regional Director's recommendations that they be overruled.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[5]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

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[3] *N.L.R.B. v. Modine Manufacturing Co.*, 500 F.2d 914 (C.A. 8, 1974).

[4] *Amalgamated Clothing Workers of America (Winfield Manufacturing Company) v. N.L.R.B.*, 424 F.2d 818, 828 (C.A.D.C., 1970).

[5] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs 102.67(f) and 102.69(c).

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is a corporation organized and existing by virtue of the laws of the State of Colorado and maintains its principal office and place of business in Denver, Colorado, where it is engaged in wholesale meat processing. In the course and conduct of its business operations annually, Respondent sells and ships goods valued in excess of $50,000 directly to points and places outside the State of Colorado.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees, including sanitation and clean-up employees and delivery drivers employed by the Employer at 4900 Clarkson Street, and 709 West 8th Avenue,

Denver, Colorado, excluding office clerical employees, professional employees, salesmen, guards and supervisors as defined in the Act.

2. The certification

On October 18, 1974, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 27, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on February 27, 1975, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about March 10, 1975, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about March 21, 1975, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since March 21, 1975, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described

in Section 1, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Allied Meat Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees, including sanitation and clean-up

employees and delivery drivers employed by the Employer at 4900 Clarkson Street, and 709 West 8th Avenue, Denver, Colorado, excluding office clerical employees, professional employees, salesmen, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since February 27, 1975, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 21, 1975, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Allied Meat Company, Denver, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of

employment with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, including sanitation and clean-up employees and delivery drivers employed by the Employer at 4900 Clarkson Street, and 709 West 8th Avenue, Denver, Colorado, excluding office clerical employees, professional employees, salesmen, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its 4900 Clarkson Street and 709 West 8th Avenue locations in Denver, Colorado, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 28, 1975

John H. Fanning, Member

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time production and maintenance employees, including sanitation and clean-up employees and delivery drivers employed by the Employer at 4900 Clarkson Street, and 709 West 8th Avenue, Denver, Colorado, excluding office clerical employees, professional employees, salesmen, guards and supervisors as defined in the Act.

ALLIED MEAT COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Custom House, 721 19th Street, Denver, Colorado 80202, Telephone 303-837-3551.

APPENDIX E

221 NLRB No. 60

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALLIED MEAT COMPANY

and Case 27–CA–4464

AMALGAMATED MEAT CUTTERS
AND BUTCHER WORKMEN OF
NORTH AMERICA, AFL-CIO

DECISION UPON RECONSIDERATION

On August 28, 1975, the National Labor Relations Board issued a Decision and Order[1] in the above-captioned proceeding upon the General Counsel's Motion for Summary Judgment, finding that Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and ordering it to take certain remedial action therefor. Thereafter, on September 15, 1975, Respondent filed with the Board a Motion for Reconsideration, with exhibits attached, asserting that the Board erred in its Decision wherein it stated that Respondent had not filed a response to the Notice To Show Cause why the General Counsel's motion should not be granted, when in fact such a response had been filed, and requesting reconsideration in view of this document.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1] *Allied Meat Company*, 220 NLRB No. 12.

Upon the entire record in this proceeding, the Board makes the following:[2]

Initially, we note that Respondent's response to the Notice To Show Cause was filed with the Regional Office of the Board, according to the certificate of service attached thereto, whereas the Notice To Show Cause specifically required that such response be "... filed with the Board in Washington, D.C...." However, although Respondent's response was improperly filed, we shall nonetheless grant its Motion for Reconsideration and consider its response to the Notice To Show Cause upon our Decision herein.

In its response, Respondent asserts that (1) the General Counsel's motion was not filed in compliance with Section 102.24 of the Board's Rules and Regulations, Series 8, as amended, because it was filed only 12 days prior to the scheduled hearing; (2) the General Counsel erred in his recitation of the facts admitted by Respondent in its answer to the complaint; (3) the General Counsel's motion represented the Culmination of a pattern of unfair treatment it had received from the Regional Office; and (4) a hearing was required on its objections to the election in Case 27–RC–4663, the representation case upon which the Board's Decision in the instant case is based.

With regard to (1) and (2) above, we find no merit in these contentions as the General Counsel's filing of the Motion for Summary Judgment was not unreasonably delayed after the Respondent had filed its answer to the complaint, and the General Counsel's recitation of the facts in his motion was substantially as admitted by Respondent in its answer. Concerning (3) and (4), these issues were raised and considered by the Board in the underlying representation proceeding, and, consistent with our determination in our Decision and Order herein, these issues may not be relitigated

[2] Respondent requests consideration by the full Board of its Motion for Reconsideration. The Board panel, having duly considered this request, finds that Respondent's motion does not raise issues warranting full Board consideration.

in this proceeding. Further, with regard to (4), the hearing issue was specifically raised and resolved in the instant proceeding. In these circumstances, we shall affirm our Decision and Order.

Accordingly, it is hereby ordered that Respondent's Motion for Reconsideration be, and it hereby is, granted, and its response to the Notice To Show Cause and the General Counsel's Motion for Summary Judgment be, and it hereby is, accepted and considered.

IT IS FURTHER ORDERED that for the reasons set forth above, the Board's Decision and Order in this matter be, and it hereby is, affirmed.

Dated, Washington, D.C. Nov. 3, 1975.

John Fanning, Member

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX F

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 76-1072

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. ALLIED MEAT COMPANY, Respondent.	)	On Application for Enforcement of an Order of the National Labor Relations Board (Docket No. 27-RC-4663)

Richard B. Bader, Attorney, National Labor Relations Board (John H. Ferguson, Attorney, John E. Higgins, Jr., Deputy General Counsel, and Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, on the brief), for petitioner.

Kenneth R. Stettner (Robert G. Good on the brief), for Respondent.

Before BARRETT and DOYLE, Circuit Judges, and CHILSON,* Senior United States District Judge.

DOYLE, Circuit Judge.

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*Of the District of Colorado, sitting by designation.

The National Labor Relations Board here seeks enforcement of its order against respondent Allied Meat Company, which order[1] required Allied Meat Company to cease and desist its refusal to recognize and to bargain with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 641, contrary to Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. Section 151, *et seq.*

The dispute had its beginning with a request for an election followed by the N.L.R.B. supervised election held on November 30, 1973. The subject of this election was exclusive bargaining representation by the Meat Cutters Union. After it had been held, there was a successful challenge to one ballot and this resulted in a tie vote. The union then objected to the conduct of the election and the result was a Board investigation. The Hearing Officer found after a hearing that five of a total of seven wage raises took place during the relevant pre-election period and that these raises were not adequately justified by Allied as being granted for business reasons. On that ground the Examiner recommended the setting aside of the election. The N.L.R.B. adopted the Hearing Officer's findings, conclusions and recommendations for a new election.

The second election was overwhelmingly in favor of the union (19-4). Allied objected and continues here to object to the voiding of the first election. Generally, it challenges the second contending that:

1. The first election was valid.

2. Union officials and members unalawfully congregated at the entrance to Allied's plant before and during the election.

3. The Union provided alcoholic beverages to the employees before and during the election.

4. The Union misrepresented facts to employees.

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[1] It was issued August 28, 1975, 221 N.L.R.B. No. 12, and reaffirmed November 3, 1975, 221 N.L.R.B. No. 60.

5. There was other conduct by the Union so as to preclude a fair election.

The N.L.R.B. made an investigation of the above charges. The Regional Director reported that there were insufficient facts to justify the setting aside of the second election on February 27, 1975. The N.L.R.B. adopted that report and certified the union as the bargaining agent. Thereafter, when Allied refused to bargain the union filed an unfair labor practice charge with the N.L.R.B. Allied answered this charge by challenging the N.L.R.B.'s actions setting aside the first election and overruling the company's objections to the second. The Board held that Allied had violated the Act, Sections 8(a)(5) and (1). It granted summary judgment against the employer and later reaffirmed that judgment.

I.

THE GENERAL CONTENTIONS

Two more or less general contentions are raised by Allied. The first is that the Hearing Officer was unfair and that this stemmed from the structure of the N.L.R.B. in which the Officer is a co-employee of the regional directors's representative. The second point is that Allied was prejudiced by the initial failure of the Board to consider its response to the motion for summary judgment due to its alleged late arrival. In fact it did not arrive late.

Neither of these general contentions is meritorious. The Hearing Officer does not appear to have been prejudiced or biased in the conduct of the hearing. The response was ultimately on rehearing given full consideration. It contained nothing which made a factual hearing necessary. Allied has not shown that it was prejudiced.

II.

WHETHER THE WAGE INCREASES WERE MEANT TO INFLUENCE THE ELECTION

With respect to the employees Ponzio and Mollender being offered wage increases, there was a conflict in the testimony as to whether this was timed to influence the election. The Hearing Officer gave credence to the witnesses and testimony which placed the pay raises after November 1, 1973. The

contrary testimony of the company witness, Wagner, was rejected. The Hearing Officer also refused to credit the testimony of Mr. Wagner as to the reasons for the increases. Thus, it is plain that the weighing process on the part of the officer dealt with facts. His findings had adequate support.

The pay raise of the employee Vialpando also presented a factual dispute as to the time of the promise. The Hearing Officer found that it was in November by working back from its effective date. Once again the result is based on findings supported by evidence.

A conclusion similar to those reached in the above instances follows in the cases of the increases given to the employees Morrow and Winans. The Hearing Officer rejected the contention that there existed a valid business reason for the giving of the increases at the particular time. We cannot say that he was wrong.

III.

WHETHER ALLIED'S OBJECTIONS TO THE CONDUCT OF THE SECOND ELECTION AS BEING INVALIDLY INFLUENCED BY THE UNION ARE ENTITLED AS A MATTER OF LAW TO BE A BASIS FOR VOIDING THE ELECTION

We conclude that they were not.

The objections stressed in this area are two. The first concerns a union guarantee of a 40 hour work week. The second allegation pertains to the union's furnishing of alcoholic drinks before or during the election. The report of the Acting Regional Director rejected these contentions for lack of evidence. Being post-election complaints there is a reluctance to hold hearings and indeed such hearings are unnecessary if the issues raised are insubstantial. *See* N.L.R.B. v. Gold Spot Dairy Inc., 432 F.2d 125, 128 (10th Cir. 1970). Conclusory statements fail to fill the evidentiary requirement. *See* N.L.R.B. v. WEK Drilling Co., 438 F.2d 267, 269 (10th Cir. 1971). The tender by the company in support of the post-election complaint lacked the necessary strength.

The Board's order is directed to be enforced.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 76-1072
ALLIED MEAT COMPANY, Respondent.	)	

JUDGMENT

Before: BARRETT and DOYLE, Circuit Judges, and CHILSON,* Senior United States District Judge.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Allied Meat Company, Denver, Colorado, its officers, agents, successors, and assigns on August 28, 1975. The Court heard argument of respective counsel on November 15, 1976, and has considered the briefs and transcript of record filed in this cause. On January 3, 1977, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Tenth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Respondent, Allied Meat Company, Denver, Colorado, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said Order contained.

/s/ William E. Doyle
Judge, United States Court of Appeals for the Tenth Circuit

Dated: Jan. 18, 1977

*Of the District of Colorado, sitting by designation.

APPENDIX G

NATIONAL LABOR RELATIONS BOARD FIELD MANUAL SECTIONS 11424.4 AND 11428.4.

"11424.4 Counsel for the Regional Office – Functions and Duties: The primary function of counsel is to see that evidence adduced during the Region's investigation becomes part of the record.

"Counsel for the Regional Office should not offer new material until it is certain it will not be offered by one of the parties. Moreover, in this respect and in attacking evidence which has been presented, *he must exercise self restraint. He must be impartial, and he must display the appearance of impartiality.* (Emphasis supplied).

"Counsel for the Regional Office should be thoroughly familiar with the contents of the Regional case file and, during the hearing, should have it in his possession and should assure that the evidence adduced during the investigation is made part of the record.

"In this connection, it should be noted that counsel for the Regional Office does not have the duty of *sustaining* the Regional Director's report or supplemental decision.

"11428.4 Order of Presentation: Following the receipt of the formal papers and the explanatory statement of counsel for the Regional Office, the party which filed the objections or the party which made the challenges in question should be asked to proceed. After he has put in his case, opposing party should put in their case. Counsel for the Regional Office normally should refrain from introducing evidence (as contrasted with attacking evidence being introduced by other parties) until other parties have completed their cases – and then only if the evidence involved is essential to the completeness of the record. See 11424.4."

APPENDIX H

NATIONAL LABOR RELATIONS BOARD RULES AND REGULATIONS, SERIES 8, AS AMENDED, SECTION 102.24.

Sec. 102.24 *Motions: where to file; contents; service on other parties; promptness in filing and response.* –All motions under sections 102.16, 102.22, and 102.29 made prior to hearing shall be filed in writing with the regional director issuing the complaint. All motions for summary judgment made prior to hearing shall be filed in writing with the Board pursuant to the provisions of section 102.50. All other motions prior to hearing shall be filed in writing with the chief administrative law judge in Washington, D.C., or with the presiding judge in San Francisco, California, as the case may be. All motions made at the hearing shall be made in writing to the administrative law judge or stated orally on the record. All motions filed subsequent to the hearing, but before the transfer of the case to the Board pursuant to section 102.45, shall be filed with the administrative law judge, care of the chief administrative law judge in Washington, D.C., or the presiding judge, San Francisco, California, as the case may be. All motions made subsequent to the transfer of the case to, and while it is pending before, the Board shall be filed with the executive secretary of the Board in Washington, D.C., as provided in section 102.47. Motions shall briefly state the order or relief applied for and the grounds therefor. All motions prior to transfer of the case to the Board shall be filed by the moving party in an original and four copies and copy thereof shall be immediately served on the other parties. Unless otherwise provided in these rules, motions and responses thereto shall be filed promptly and within such time as not to delay the proceeding.

Supreme Court, U.S.
FILED
JUL 6 1977
MICHAEL RODAK, JR., CLERK

No. 76-1443

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALLIED MEAT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
RICHARD B. BADER,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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Statutes:

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Sec. 8(a)(5) and (1), 29 U.S.C. 158(a)(5) and (1)	5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1443

ALLIED MEAT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. F-7 to F-4) is not officially reported. The decision and order of the National Labor Relations Board is reported at 220 NLRB 27 (Pet. App. D-1 to D-10), and the Board's decision upon reconsideration is reported at 221 NLRB 304 (Pet. App. E-1 to E-3).

JURISDICTION

The judgment of the court of appeals (Pet. App. F-5) was entered on January 24, 1977. The peti-

tion for a writ of certiorari was filed on April 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly declined to set aside a representation election based on the employer's claim that the union had guaranteed the employees a forty-hour workweek if it won the election.

2. Whether in the circumstances of this case the Board reasonably applied its rules regarding the conduct at hearings of Regional Office representatives and the disposition of matters by summary judgment.

STATUTORY PROVISIONS INVOLVED

Section 8(a) of the National Labor Relations Act, as amended (61 Stat. 140, 29 U.S.C. 158(a)), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

1. On November 1, 1973, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, filed a representation petition seeking certification as the exclusive bargaining agent of

petitioner's production and maintenance employees (R. 511).[1] On November 30, 1973, the Regional Director of the National Labor Relations Board conducted an election among the employees, in which 13 votes were cast for the Union, 13 votes were cast against it, and one ballot was challenged (R. 514). The Union then filed timely objections to the election, alleging, *inter alia,* that petitioner had intimidated employees prior to the election (objection 2), and had granted wage increases subsequent to the filing of the election petition (objection 3) (R. 516).[2] The Regional Director's administrative investigation disclosed with respect to objection 2 that three employees alleged that they were threatened or interrogated by petitioner. It disclosed with respect to objection 3 that wage increases were granted to seven of the 26 eligible voters effective November 12, 1973, but petitioner asserted that each increase was awarded at that time because of factors other than the imminent election (R. 518–520). In order to resolve the conflicts in the evidence, the Regional Director ordered that a hearing be held before a Hearing Officer (R. 520–521).[3]

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[1] "R." refers to the record in the court of appeals, a copy of relevant portions of which has been lodged with the Clerk of this Court.

[2] Four additional objections to the election were withdrawn by the Union (R. 517).

[3] The Regional Director also sustained the ballot challenge on the ground that petitioner had discharged the voter prior to the election (R. 518).

After the five days of hearings, the Hearing Officer issued his report, finding that petitioner had not threatened or interrogated employees as alleged in objection 2, that the timing of two of the seven wage increases was mandated by pre-hire agreements, but that the justifications proferred by petitioner for the remaining five wage increases were inadequate to rebut the inference that they were timed to influence votes in the election (R. 525–536). Accordingly, he recommended that objection 2 be overruled, that objection 3 be sustained, and that the election be set aside (R. 536). Petitioner filed timely exceptions to the Hearing Officer's report (R. 537–541), and, on August 28, 1974, the Board adopted the Hearing Officer's recommendations, set aside the first election, and directed that a second election be conducted (Pet. App. A–1 to A–6).[4]

Pursuant to the Board's order, a second election was held among petitioner's employees on October 18, 1974, in which 19 votes were cast for the Union, 4 votes were cast against the Union, and one vote was challenged (R. 565). Petitioner filed timely objections to the election, alleging, *inter alia,* that the Union had made material misrepresentations of fact to the employees which petitioner had no opportunity to rebut

[4] Chairman Miller disagreed with the Hearing Officer's conclusion that wage increases granted to two of the five employees interfered with the election, but he agreed that the remaining three increases did interfere, and he concurred in setting the election aside (Pet. App. A–4, n. 4).

(R. 567).[5] Based on an administrative investigation, the Acting Regional Director recommended that each of petitioner's objections to the election be overruled. He found, *inter alia,* that the only misrepresentation alleged by petitioner was a "guarantee" by the Union to obtain a forty-hour workweek for the employees if it were selected, that this allegation was denied by the Union and was not supported by employee witnesses, and that, in any event, the "guarantee" was one which the Union was in no position to fulfill (Pet. App. B–1 to B–4). Petitioner filed timely exceptions to the Acting Regional Director's report, and, on February 27, 1975, the Board adopted the Acting Regional Director's recommendations and certified the Union as the exclusive bargaining representative for petitioner's maintenance and production employees (Pet. App. C–1 to C–2).

Petitioner continued to refuse to bargain, and the Union filed an unfair labor practice charge with the Board. On April 30, 1975, the Regional Director issued a complaint alleging that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (R. 583–587). When petitioner filed its answer again challenging the validity of the certification, counsel for the General Counsel moved the Board for summary judgment on the ground that all matters raised by petitioner had previously been raised and rejected in the representation pro-

[5] Petitioner's four additional objections, all of which were overruled by the Board, have not been reasserted in this Court.

ceeding. The Board issued a notice to show cause why summary judgment should not be granted.

On August 28, 1975, upon finding that petitioner had not filed a response to the notice to show cause (Pet. App. D–3), the Board granted summary judgment. It concluded that petitioner had violated Section 8(a)(5) and (1) of the Act, and ordered petitioner to bargain with the Union upon request (Pet. App. D–1 to D–10).

Petitioner then filed a motion for reconsideration, claiming that it had in fact responded to the notice to show cause (see Pet. Opp. E–1). On November 3, 1975, the Board granted the motion for reconsideration, considered and rejected each contention made in petitioner's response to the notice to show cause, and reaffirmed its original decision and order (Pet. App. E–1 to E–3).

2. The court of appeals enforced the Board's order. It concluded, *inter alia,* that the "Hearing Officer does not appear to have been prejudiced or biased in the conduct of the hearing" on the objections to the first election, that petitioner's response to the notice to show cause "contained nothing which made a factual hearing unnecessary," and that petitioner's objections to the second election "lacked the necessary strength" to require an evidentiary hearing since "such hearings are necessary if the issues raised are insubstantial" (Pet. App. F–1 to F–4).

ARGUMENT

1. The Board was correct in rejecting petitioner's objection to the second election based upon the Union's alleged "guarantee" to obtain a forty-hour workweek if it was chosen by the employees. Such promises to obtain increased benefits for the employees are commonplace in an election campaign, and, since the employees are aware that the union has no power to fulfill them except through bargaining, they uniformly have been held not to constitute a misrepresentation which would tend to interfere with employee free choice. See *National Labor Relations Board* v. *Gilmore Industries, Inc.,* 341 F. 2d 240, 242 (C.A. 6); *National Labor Relations Board* v. *Golden Age Beverage Co.,* 415 F. 2d 26, 28, 30 (C.A. 5); *Olson Rug Co.* v. *National Labor Relations Board,* 260 F. 2d 255, 257 (C.A. 7); *Wilson Athletic Goods Mfg. Co.* v. *National Labor Relations Board,* 164 F. 2d 637, 639–640 (C.A. 7). See also, *National Labor Relations Board* v. *Sauk Valley Mfg. Co.,* 486 F. 2d 1127, 1131 (C.A. 9).[6]

[6] Neither *Cross Bakery Co.* v. *National Labor Relations Board,* 453 F. 2d 1346 (C.A. 1), nor *Walled Lake Door Co.* v. *National Labor Relations Board,* 472 F. 2d 1010 (C.A. 5), relied upon by petitioner to establish a conflict among the circuits (Pet. 7), involved a similar campaign promise. In each of those cases the union was found to have misrepresented an existing fact, the amount of a wage increase obtained at another plant and the number of the employer's plants which had already been unionized, respectively. No such misrepresentation of existing facts was alleged in the instant case. The other cases cited by petitioner (Pet. 7–8) are similarly inapposite.

Contrary to petitioner's assertion (Pet. 6–7), moreover, the Board did not apply a double standard in determining that a hearing should be held on the Union's objections to the first election, while denying a hearing on petitioner's objection to the second election. The Union's objections raised substantial and material factual issues, which, if resolved in the Union's favor (as they were), would be sufficient to overturn the election; moreover, they were supported by direct evidence (R. 519–520). With respect to the second election, on the other hand, petitioner submitted only "equivocal hearsay" (*United States Rubber Co.* v. *National Labor Relations Board,* 373 F. 2d 602, 606 (C.A. 5)) in support of an objection (R. 577) that, as explained *supra,* was legally insufficient even if proved.

2. Petitioner's remaining contentions also lack merit. Petitioner asserts first that the Hearing Officer failed to require the Regional Director's representative to conform to the impartiality requirements of the Board's Field Manual during the hearing on objections to the first election (Pet. 3–4, 8). However, the Board, after reviewing the record, was "not persuaded that the conduct of the Regional Director's representative exhibited lack of impartiality in violation of the Agency's Field Manual or otherwise" (Pet. App. A–3, n. 2). Rather, the Board found that the representative, in examining witnesses and introducing evidence, was merely performing his proper

function of insuring that "a complete record was made upon which the Hearing Officer, and eventually the Board, would be able to render their considered opinions" (*ibid.*). Morever, as the court below found, the Hearing Officer, who alone had decisional power, "does not appear to have been prejudiced or biased in the conduct of the hearing" (Pet. App. F–3).[7]

Petitioner next asserts that the Board should have refused to grant summary judgment in the unfair labor practice proceeding because the motion for summary judgment was allegedly filed too late under the Board's rules (Pet. 5, 8). However, the rule relied upon by petitioner provides only that such motions shall be "filed promptly and within such time as not to delay the proceeding" (Pet. App. H–1). The motion for summary judgment was filed on June 12, 1975 (R. 593), one month after petitioner filed its answer to the unfair labor practice complaint (R. 590). The Board, construing its flexible rule in light of the circumstances of this case, properly held that the filing of the motion "was not unreasonably delayed after the Respondent had filed its answer to the complaint"

[7] The Regional Director's representative's alleged remark about petitioner's counsel's lack of ethics (Pet. 3–4) was made off the record, out of the hearing of the Hearing Officer, who first heard about it when petitioner's counsel stated his version of the conversation on the record (Pet. App. A–3, n. 2.) Accordingly, the Board properly concluded that "the Hearing Officer could not have been influenced by the incident in making his rulings and recommendations herein" (*ibid.*).

(Pet. E–2). In any event, since, as the court below found, petitioner's response "contained nothing which made a factual hearing necessary" (Pet. App. F–3), petitioner's case could not have been prejudiced by the Board's decision to grant summary judgment.

Petitioner's final contention is that the Board refused to consider its response to the notice to show cause (Pet. 8–9). Admittedly, the Board had not received petitioner's response when it issued its original decision and order.* But, when petitioner brought its response to the Board's attention, the Board promptly reconsidered the case in light thereof, and specifically responded to each of petitioner's contentions before reaffirming its decision (Pet. App. E–1 to E–3). As the court of appeals found, petitioner's contentions were thus given "full consideration" (Pet. App. F–3).

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*Contrary to petitioner's contention (Pet. 6), the file stamp on petitioner's response (R. 595) shows that it was filed with the Division of [Administrative Law] Judges, rather than with the Board itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977